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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND
RULES 15.5 and 39 OF THE
ARIZONA RULES OF
CRIMINAL PROCEDURE

)
)
) Supreme Court No. R15-_____
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)
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Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Maricopa County Public Defender's Office ("MCPD") respectfully petitions this Court to adopt the attached proposed amendments to Rules 15.5 and 39 of the Rules of Criminal Procedure. The text of the proposed amendments is set out in the accompanying Appendix A.

MCPD is the largest indigent defense law firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa

County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 45,000 criminal cases.

I. Background and Purpose of the Proposed Rule Amendments.

Current Criminal Rule 15.5 provides, *inter alia*, mechanisms for any party in criminal matter to obtain protective orders and excision orders in regards to documents and other disclosure. However, the Criminal Rules currently do not specify any procedures a party must follow when withholding information from discovery, as do the Arizona Rules of Civil Procedure.

Current Rule 39 of the Arizona Rules of Criminal Procedure permits a prosecutor to withhold, during discovery and other proceedings, the victim's date of birth, social security number, official state or government issued driver license or identification number, home address, telephone number, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer (the "eight protected data items").

Parties in criminal matters withhold information using a variety of methods. In documents, information is often withheld using a form of redaction. This proposal seeks to address three of the collateral issues that have arisen with the increasing numbers of redactions in criminal matters.

II. Current Issues with Withheld Information

Problems have arisen with the redaction of discovery in criminal proceedings. Sometimes, 1) the redactions themselves are not identifiable, making it unclear whether certain fields were redacted, or were simply never populated in the original document; 2) information is redacted that would otherwise be subject to disclosure and discovery; and 3) other times, discovery is so extensively redacted as to render it virtually meaningless and/or the product of errant redaction. The proposed rule changes here are modeled after Arizona Rule of Civil Procedure 26.1(f) and are designed to address the problems discussed above.

A. Proposed Criminal Rule 15.5(e) Ensures That Redactions Are Clearly Identified.

Although some redactions are clearly identified (e.g., by “blacking-out” items that are written on a white background), others are not. For example, in Example 1 which follows, two fields has been redacted by using white correction fluid on the subject fields on the original document and then photocopying the original document:

EXAMPLE 1

ANYTOWN POLICE DEPARTMENT REPORT

ORIGINAL PAGE NUMBER: 2 RPT NUMBER: 2014-00000

RIGHTS ADVISED: YES TIME: 12:55 OFFICER: 9999

ARRESTED PERSON -02:

NAME: PUBLIC, JOHN Q **[**FLED**]**

SPEAKING: ENGLISH

RACE: W SEX: M AGE: 32 DOB: 010182 HT: 601 WT: 190

HAIR: BLK EYES: BLU SSN:

OLN: AZ

R&I:

HOME: 001234 MAIN STREET

APT/SUITE:

ANYTOWN AZ

ZIP CODE: 12345

LEVEL OF FORCE: RESTRAINT, JOINT LOCKS, PRESSURE PTS OR CUFFS

CITIZENSHIP: UNITED STATES OF AMERPLACE OF BIRTH: ARIZONA

What is not apparent in Example 1 above is which fields have been redacted as opposed to omitted. These two redactions, however, are clearly identifiable when the redacting party “blacks-out” the fields (assuming the background is white), as evident in Example 2 below:

EXAMPLE 2

ANYTOWN POLICE DEPARTMENT REPORT

ORIGINAL PAGE NUMBER: 2 RPT NUMBER: 2014-00000

RIGHTS ADVISED: YES TIME: 12:55 OFFICER: 9999

ARRESTED PERSON -02:

NAME: PUBLIC, JOHN Q **[**FLED**]**

SPEAKING: ENGLISH

RACE: W SEX: M AGE: 32 DOB: 010182 HT: 601 WT: 190

HAIR: BLK EYES: BLU SSN: **[REDACTED]**

OLN: **[REDACTED]** AZ

R&I:

HOME: 001234 MAIN STREET

APT/SUITE:

ANYTOWN AZ

ZIP CODE: 12345

LEVEL OF FORCE: RESTRAINT, JOINT LOCKS, PRESSURE PTS OR CUFFS

CITIZENSHIP: UNITED STATES OF AMERPLACE OF BIRTH: ARIZONA

In Example 2 above, the opposing party may wish to contest the redactions as not complying with the limited exceptions under Criminal Rules 15 and 39, but likely would not have known about these potentially contestable redactions using the method of redaction used in Example 1.

Tracking Civil Rule 26.1(f)¹ almost identically, the proposed rule change creating Criminal Rule 15.5(e) requires that redactions “shall be made expressly.”

¹ The text of the Arizona Civil Rule Reads:

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) *Information Withheld.* When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced.* If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Ariz. R. Civ. P. 26.1(f).

By its plain language, “expressly” means that the redaction must be clearly identifiable as in Example 2 above. This language provides some latitude in how redactions are performed, so that in the case where the subject media on which the redaction is to be performed does not lend itself to “blacking-out” (e.g., a black background on a document, or digital audio file), an appropriate redaction method can be employed, as long as it clearly identifies what has been redacted. In civil practice, attorneys routinely create and provide a log of the redactions to the other parties, identifying the redactions by number, description, and the legal basis supporting the claim. Proposed Criminal Rule 15.5(e) institutes a mechanism so the receiving party can clearly identify 1) what items have been redacted by the disclosing party and 2) the legal basis for doing so. These procedures thus enable the receiving party to potentially contest excisions, consistent with Civil Rule 26.1(f) and other areas of the law.²

²Similarly, Arizona Supreme Court Rule 123(c),² which applies to judicial records, requires redactions from judicial records to be clearly marked, identified, and the legal basis for the redaction provided:

Upon request, the custodian shall reproduce any record containing public information that would otherwise be closed, by redacting all confidential information from the record unless release of the entire record is prohibited by law. *Records that are reproduced after redaction shall contain a disclosure that they were redacted*, unless such disclosure would defeat the purpose of the redaction. *Identification of redacted records shall include a description of the nature and length of the matters contained therein*, unless the description, if given,

B. The Proposed Changes Will Promote Proper Redactions, Reduce the Need for Court Intervention to Resolve Redaction Disputes, and Ensure a Defendant's Right to a Fundamentally Fair Trial.

Victim cases present challenges in disclosure and redaction. One problem occurs when the redacting party redacts items that are beyond the scope of the eight protected data items. *See* A.R.S. § 13-4434 and Criminal Rule 39(b)(10). Another problem occurs when, in multiple victim cases, the redactions are so extensive so as to render the disclosure essentially incomprehensible. A third problem occurs when non-victim information is mistaken for one of the multiple victims and is accidentally redacted. These problems typically require judicial intervention to resolve, and may require an *in camera* review of extensive discovery.

The proposed changes would reduce judicial intervention to resolve the problems articulated above by requiring the legal basis for the redaction to be identified. For example, a redaction of a victim's birthdate that provided no information before would now identify the redaction as "victim's date of birth."

In multiple victim cases (or where it is not clear which victim's information has been redacted), the proposed rule changes ensure that a redaction would include the victim's name (e.g., "Jane Public's address") so that it is clear which victim's

constitutes a disclosure of confidential information. *Upon request, the custodian shall identify the legal authority for the redaction.*

Ariz. Sup. Ct. R. 123(c)(2)(C) (emphasis added).

information has been redacted. Imagine, for example, a police report involving a police foot pursuit traversing multiple residences in a neighborhood whereby each residence is redacted from the police report. The proposed identification of the victim's name would allow defense counsel, in this example, to understand that police began at the address of Victim A then proceeded to the address of Victim B, and so on. Thus, the proposed rule changes here ensure meaningful disclosure to a defendant (thereby promoting effective assistance of counsel), while simultaneously ensuring that protected victim information (the actual address in this example) remains protected.

The proposed rule changes would also promote proper redaction by requiring attorneys to identify the basis for the redaction up front. Because the redaction log would contain the victim name and basis for redaction, an inadvertent redaction of a non-victim 1) might be prevented at the outset, as the entry into the redaction log would reveal that the information belongs to a person not previously identified as a victim or 2) provide sufficient information to the receiving party to contest the basis for the redaction. Thus, the proposed rule changes provide a mechanism to reduce errant redaction and provide meaningful discovery to the receiving party, thus reducing the need for judicial intervention to resolve redaction disputes.

III. Conclusion

As explained above, the proposed rule changes would simultaneously effect the goals of victims' rights, a defendant's due process rights and advance judicial economy. The proposed rule changes merely bring criminal procedure, as it relates to redactions of discovery, in line with other areas of the law.

RESPECTFULLY SUBMITTED this 08 day of January, 2015.

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APPENDIX A

Proposed Rules Changes

(Proposed deletions are shown with ~~striketrough~~, new language is shown with underscoring)

Arizona Rules of Criminal Procedure

Rule 15.5. Excision and protective orders

a. [no changes]

b. [no changes]

c. [no changes]

d. [no changes]

e. Claims of Privilege or Protection

(1) *Information Withheld*. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced*. If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Rule 39. Victims' Rights

a. [no changes]

b. Victims' Rights.

1. through 9. [no changes]

10. The right to require the prosecutor to withhold, during discovery and other proceedings, the victim's date of birth, social security number, official state- or government-issued driver license or identification number, home address, telephone number, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer; provided, however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant. When information is withheld from disclosure or discovery pursuant to this rule, the prosecutor shall follow the process set forth in Rule 15.5(e). Additionally, the prosecutor shall identify the victim's name (in the case of multiple victims or when it is unclear which victim's information is being withheld), and the legal basis for withholding the information.

11. through 16. [no changes]

c. through g. [no changes]